

## Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of No Oral Modification Clauses

Robert A. Hillman

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>



Part of the [Law Commons](#)

---

### Recommended Citation

Hillman, Robert A. (1988) "Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of No Oral Modification Clauses," *Cornell International Law Journal*: Vol. 21: Iss. 3, Article 4.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol21/iss3/4>

This Comment is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses

At first glance, article 29(2)<sup>1</sup> of the United Nations Convention on Contracts for the International Sale of Goods<sup>2</sup> appears clear and uncontroversial. A party may enforce a clause barring oral modification or termination of a contract (a "no oral modification" or "NOM" clause) unless reliance on that party's conduct precludes enforcement. On further reflection, however, one realizes that article 29(2) raises many difficult questions.<sup>3</sup> This should hardly be surprising to lawyers in the United States. The legal effect of NOM clauses in this country is shrouded in mystery. Inadequate drafting of the pertinent sections of the Uniform Commercial Code<sup>4</sup> has been a major source of the confusion.<sup>5</sup> However, the Code's curious drafting is itself the result of an underlying ambivalence about the desirability of enforcing NOM clauses at all. This ambivalence, shared by the drafters of article 29(2),<sup>6</sup> derives

---

\* Professor of Law, Cornell University. I thank Stewart Schwab for his valuable comments.

1. For the text of article 29(2), see *infra* text accompanying note 72.

2. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18 (1980), reprinted in [1980] Y.B. UNCITRAL 151, U.N. Doc. A/CN.9/SER. A/1980, and in 19 I.L.M. 668 (1980) [hereinafter CISG or Convention].

3. See Part III, *infra*.

4. Hereinafter referred to as U.C.C. or Code.

5. See Part II, *infra*; Hillman, *A Study Of Uniform Commercial Code Methodology: Contract Modification Under Article Two*, 59 N.C. L. REV. 335 (1981) (concluding that the U.C.C.'s approach to modifications has not been successful).

6. See *Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session*, A/CN.9/142, paras. 146-147, reprinted in [1978] IV Y.B. UNCITRAL 21 CORNELL INT'L L.J. 449 (1988)

from uncertainty about the extent to which parties should be able to restrict their freedom to adjust their contracts.

Part I of this paper examines the underlying and often conflicting forces that make NOM clauses so controversial. Part II reviews the problematic approach of the U.C.C. Part III evaluates article 29(2) of the Convention in light of the underlying issues and the experience of the U.C.C. Finally, Part IV offers some suggestions for the next group of statutory drafters attempting to decide an appropriate approach to the problem of NOM clauses.

## I. The Nature Of NOM Clauses

A no oral modification clause operates as a private statute of frauds.<sup>7</sup> Parties include such a clause to protect themselves from an inadvertent or unwise oral adjustment<sup>8</sup> and to prevent fraudulent or mistaken claims of modification of a written agreement.<sup>9</sup> Even if a NOM clause does not, in fact, promote these reasonable objectives, the principle of freedom of contract seems to suggest that parties should be free to include the provision if they believe it will serve these purposes.<sup>10</sup>

Recognition of NOM clauses may also promote efficiency. According to economic analysts of law, individuals are generally the best judges of their own interests.<sup>11</sup> Parties who agree to a NOM clause believe that their gains in increased certainty and stability outweigh the increased costs of contractual modifications.<sup>12</sup> A legal regime that does not

---

61.72; *Report of the Working Group on the International Sale of Goods on the Work of Its Eighth Session*, A/CN.9/128, paras. 40-42, reprinted in [1977] VIII Y.B. UNCITRAL 73, 77.

7. A typical NOM clause might state: "This contract may be modified or rescinded only by a writing signed by both of the parties or their duly authorized agents." Hart & Willer, *Forms and Procedures under the Uniform Commercial Code* 5 U.C.C. Serv. (MB) § 21.07[3] (1974).

8. Professor Lon L. Fuller discussed the theoretical justifications for the statute of frauds in his article, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). He argued that legal formalities, such as a writing, a seal, and consideration "act as a check against inconsiderate action [and] induc[e] the circumspective frame of mind appropriate in one pledging his future." *Id.* at 800. See also Hillman, *supra* note 5, at 357.

9. See, e.g., 6 A. CORBIN, CORBIN ON CONTRACTS § 1295, at 205 (2d ed. 1962). See also, Fuller, *supra* note 8. Professor Fuller noted that legal formalities serve an "evidentiary function" in that they provide "evidence of the existence and the purport of the contract." *Id.* at 800 (quoting Austin).

10. The principle of freedom of contract is . . . rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises. RESTATEMENT (SECOND) OF CONTRACTS 2-3 (1981) (Introductory Note to Chapter 8). "Freedom of contract may be premised on the utilitarian position that everyone is the best judge of his or her own interests or on the view that we should respect a person's autonomy." Atiyah, Book Review, 95 HARV. L. REV. 509, 523 (1981) (reviewing C. FRIED, *CONTRACT AS PROMISE*). See also Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 620 (1983).

11. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 n.10 (1972).

12. *Id.* at 1113.

enforce NOM clauses arguably conflicts with the parties' long-term goals.

But NOM clauses have a checkered history. Courts in the United States generally refuse to enforce them.<sup>13</sup> Although the Uniform Commercial Code purported to reverse the common law,<sup>14</sup> several statutory caveats narrowly limit the use of NOM clauses.<sup>15</sup> Even when courts confront cases where NOM clauses arguably apply, they sometimes engage in elaborate gymnastics to evade their enforcement.<sup>16</sup> What underlies this reluctance?

There are many problems with NOM clauses. First, they may actually impede contractual freedom rather than enhance it. One can argue with some enthusiasm that parties should be free to change their minds about any issue, including their agreed process of adjustment.<sup>17</sup> Second, NOM clauses may be unfair. Commentators have noted that they often "operate against the innocent and unwary," and that it would be unjust to bar enforcement of an oral modification when a party relies on it.<sup>18</sup>

NOM clauses may also conflict with prevailing commercial practices of contract modification. Despite contrary intentions at the time of agreement, parties often informally adjust their contracts in response to unforeseen changes in circumstances.<sup>19</sup> Some commentators suggest that NOM clauses impede such good faith agreements.<sup>20</sup> This criticism may seem overly paternalistic.<sup>21</sup> Nevertheless, it reflects the thrust of modern contract law towards facilitating actual business practices.<sup>22</sup>

Finally, some distrust NOM clauses because they suspect that a writing does not necessarily promote the cautionary and evidentiary functions traditionally associated with legal formalities.<sup>23</sup> In our hurried business world, people often sign writings without reading or contemplating them. In addition, wrongdoers can easily produce "expert" for-

13. See, e.g., *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1286 (7th Cir. 1986); *Wagner v. Graziano Construction Co.*, 390 Pa. 445, 448, 136 A.2d 82, 83-84 (1957); CORBIN, *supra* note 9, § 1295, at 212; E. FARNSWORTH, *CONTRACTS* 475 (1982).

14. U.C.C. § 2-209(2). See *infra* notes 31-37 and accompanying text.

15. U.C.C. §§ 2-209(4), 2-209(5). See *infra* notes 38-43 and accompanying text.

16. See, e.g., *Gold Kist, Inc. v. Pillow*, 582 S.W.2d 77 (Tenn. App. 1978).

17. See CORBIN, *supra* note 9, § 1295, at 206-08. See also *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N.E. 549 (1889) (Justice Holmes); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 388, 122 N.E. 378, 381 (1919) (Judge Cardozo).

18. CORBIN, *supra* note 9, at 212. See also FARNSWORTH, *supra* note 13, at 475.

19. Critics of NOM clauses can point to the number of cases involving oral modifications in the face of NOM clauses to support this observation. On the informality of business dealings generally, see Macaulay, *An Empirical View of Contract*, 1985 Wis. L. Rev. 465, 467, and his other works cited therein.

20. See, e.g., Corbin, *supra* note 9, at 212.

21. "We will not enforce your NOM clause because we know you will change your mind and seek to make an oral adjustment later." See generally Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

22. See, e.g., U.C.C. § 1-102.

23. See Fuller, *supra* notes 8 and 9.

geries.<sup>24</sup> Indeed, a NOM clause may even promote fraud by encouraging a party wrongfully to deny the existence of an oral agreement to adjust a contract term.<sup>25</sup>

Unfortunately, the NOM clause debate is inconclusive. Arguments appealing to freedom and fairness are inherently controversial. Philosophers and legal scholars have long wrestled with the question of what constitutes individual and contractual freedom, inquiries that raise issues closely paralleling those posed by a NOM clause.<sup>26</sup> In addition, the unfairness of ignoring a party's reliance on an oral modification depends on whether the reliance was reasonable and foreseeable to the other party. Such issues intersect with the threshold questions of the nature and validity of NOM clauses.<sup>27</sup>

The NOM clause debate is also inconclusive because we simply do not know whether business would benefit more from facilitating or deterring oral modifications of written agreements when the parties originally intended to bar such adjustments. The answer to this question depends on comparing the frequency and costs of parties mistakenly thinking a NOM clause benefits them with the frequency and benefits of parties correctly including a NOM clause.<sup>28</sup> This question, therefore, awaits empirical investigation. Similarly, the question of whether a statute of frauds actually decreases fraud and appropriately cautions parties is also highly debatable and ultimately empirical.<sup>29</sup> In light of the inconclusiveness of the philosophical debate and the dearth of empirical evidence, it is hardly surprising that lawmakers are ambivalent about NOM clauses.

As a result of this conceptual morass, lawmakers have tended to adopt intermediate positions. The compromise adopted by the drafters of the CISG is to enforce a NOM clause only when a party contesting the clause has not relied on an oral modification or other conduct.<sup>30</sup> The problem with compromise positions, however, is that they may create confusion, even rendering the law ineffective. This accurately portrays the U.C.C.'s experience. It may be an accurate forecast of the future under the CISG.

---

24. See, e.g., J. WHITE & R. SUMMERS, HANDBOOK ON THE UNIFORM COMMERCIAL CODE 72 (2d ed. 1980); Hillman, *supra* note 5, at 368.

25. See WHITE & SUMMERS, *supra* note 24, at 72-74.

26. See, e.g., J. ELSTER, ULYSSES AND THE SIRENS 36-111 (1984) ("[B]inding oneself is a privileged way of resolving the problem of weakness of will; the main technique for achieving rationality by indirect means." *Id.* at 37.); Kronman, *supra* note 21, at 764 (law invalidating certain terms "protect[s] the promisor . . . by limiting his power to do what the law judges to be against his own interests. . .").

27. Is it reasonable to rely on an oral modification when the parties' agreed that such an adjustment would be unenforceable? Is such reliance foreseeable? On the problem of circularity in reliance jurisprudence, see, e.g., Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 274-276 (1986).

28. See *supra* notes 11-12 and accompanying text.

29. Cf. *supra* notes 8-9.

30. See *infra* notes 72-92 and accompanying text.

## II. A Brief Look At NOM Clauses Under The Uniform Commercial Code

As noted earlier,<sup>31</sup> courts in the United States generally refuse to enforce NOM clauses.<sup>32</sup> The drafters of the Uniform Commercial Code, however, resurrected them in Section 2-209(2).<sup>33</sup>

The Code included Section 2-209(2) as part of a larger effort to expunge outdated common-law doctrines which impede good faith modifications.<sup>34</sup> A major element of this revision was abolition of the much criticized common-law requirement of consideration to enforce a modification.<sup>35</sup> Some believe, however, that consideration cautions the parties and provides evidence of their transaction.<sup>36</sup> Eliminating the doctrine of consideration from contract modifications also removed these safeguards, and Section 2-209(2) was included to allow parties to protect themselves by establishing their own statute of frauds.<sup>37</sup>

Section 2-209(4), however, clouds the analysis.<sup>38</sup> According to the section, if parties include a NOM clause, but later "attempt" to modify their agreement without satisfying their NOM clause, their "attempt"

---

31. See *supra* note 13 and accompanying text.

32. See, e.g., *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1286 (7th Cir. 1986) (citing *Wagner v. Graziano Construction Co.*, 390 Pa. 445, 448, 136 A.2d 82, 83-84 (1957)); *S & M Rotogravure Service, Inc. v. Baer*, 77 Wis. 2d 454, 252 N.W.2d 913, 920 (1977). See also RESTATEMENT (FIRST) OF CONTRACTS § 407 comment a (1932); RESTATEMENT (SECOND) OF CONTRACTS § 283 comment b (1981); CORBIN, *supra* note 9, § 1297, and cases cited therein.

33. Section 2-209(2) provides: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . . ." According to the New York Law Revision Commission, the rescission language prevents the parties from circumventing the section. In its absence, the parties could orally rescind their agreement, including the NOM clause, and enter a new oral agreement that alters the original contract. See NEW YORK LAW REVISION COMMISSION, 1 STUDY OF THE UNIFORM COMMERCIAL CODE, Doc. No. 65(c), at 643, 728-29 (1955).

34. See DUSENBERG & KING, *Sales and Bulk Transfers Under the Uniform Commercial Code*, 3 U.C.C. SERV. (MB) § 4.04[1] (1966 and 1987 Supp.); W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-209:01 (1986).

35. This requirement was eliminated in U.C.C. Section 2-209(1), which provides: "An agreement modifying a contract within this Article needs no consideration to be binding." At common law, a promise to provide additional consideration in return for a performance the other party was already bound to perform was unenforceable for lack of consideration. See *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902); Hillman, *Policing Contracting Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 851-852 (1979). This doctrine, known as the preexisting duty rule, was intended to deter coerced modifications. But the doctrine also barred some voluntary modifications unsupported by consideration. As a result, many disfavored the doctrine, prompting the Code drafters to eliminate it. See DUSENBERG & KING, *supra* note 34, at 4.04[1]. In place of consideration, the Code polices coercion through the Section 1-203 requirement of good faith performance. Hillman, *supra*, at 852-55.

36. HAWKLAND, *supra* note 34, at 2-209:03. See generally Fuller, *supra* notes 8 and 9.

37. See DUSENBERG & KING, *supra* note 34, at § 4.04[2][a]; HAWKLAND, *supra* note 34, at 2-209:93.

38. The section provides: "Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) . . . it can operate as a waiver."

"can operate as a waiver." This curious language presents many difficulties.<sup>39</sup> For example, the Code fails to define clearly what constitutes an "attempt at modification" that does not satisfy Section 2-209(2). Obviously the drafters contemplated something short of a signed writing, for this would satisfy the section. But an "attempt at modification" might require an oral agreement, a unilateral relinquishment of a right, or something else. Moreover, although the Code states that an "attempt at modification . . . can operate as a waiver," it fails to explain when it *does* so operate.<sup>40</sup> The language of the section suggests that not all attempts at modification operate as a waiver. Indeed, if all attempts at modification operated as a waiver, little or nothing would be left of Section 2-209(2). Even if we knew what conduct "operates as a waiver," the Code gives no guidance as to the legal effect of a "waiver" once found. Did the parties waive the NOM clause? Or did they waive the substantive term they were modifying? Does it matter?<sup>41</sup>

Section 2-209(5) also confuses the legal analysis of NOM clauses.<sup>42</sup> Suppose parties subject to a NOM clause engage in conduct that "can operate as a waiver" under Section 2-209(4). According to Section 2-209(5), if the conduct operates as a waiver, a party can retract the waiver unless retraction would be "unjust" due to "material" reliance. Obviously, the section raises yet more questions. For example, the Code's drafters neglected to clarify when retraction of a waiver would be "unjust." Nor did they define what constitutes "material" reliance. It is also unclear whether these two standards are meant to be separate tests.<sup>43</sup>

There are a host of difficulties here, and courts and commentators do not speak with one voice about solutions.<sup>44</sup> For example, one obvi-

---

39. I will raise here only those issues pertinent to an understanding of CISG article 29(2). For a full discussion of the issues arising under § 2-209, see Hillman, *supra* note 5.

40. The New York Law Revision Commission, studying the Code for possible passage in New York, suggested that "attempt at modification" was too narrow. NEW YORK LAW REVISION COMMISSION, 1 STUDY OF THE UNIFORM COMMERCIAL CODE, Doc. No. 65(c), at 645 (1955).

41. See Hillman, *supra* note 5, at 368 (arguing that modifications that "operate as a waiver" waive both the term that is the subject of the modification *and* the NOM clause).

42. U.C.C. § 2-209(5) provides:

A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of the term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

43. See, e.g., Hillman, *supra* note 5, at 373.

44. Commentators' analyses include CORBIN, *supra* note 9, at 211; Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 WASH. U.L.Q. 277, 298-302 (1980); Hillman, *supra* note 5, at 356-59, 364-67; Murray, *The Modification Mystery: Section 2-209 of the Uniform Commercial Code*, 32 VILL. L. REV. 1, 28-44 (1987). Court discussions include *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986); *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108 (5th Cir. 1984); *Linear Corp. v. Standard Hardware Co.*,

ous solution to the problem of when an oral modification agreement "operates as a waiver" focuses on reliance. An oral modification agreement "operates as a waiver" when the party urging enforcement of the oral modification relies on it.<sup>45</sup> This approach drastically diminishes the legal effect of NOM clauses.

Another analysis, elsewhere proposed by this author,<sup>46</sup> would preserve both NOM clauses and the possibility of good faith oral modifications. This approach focuses on the meaning of the term "waiver." A waiver is an intentional *relinquishment* of a right.<sup>47</sup> Therefore, a plausible distinction could be drawn between oral alterations of existing contractual terms and oral additions of entirely new ones. An oral modification would "operate as a waiver" only when it deletes or changes existing terms not when it seeks to add entirely new terms.

For example, if parties orally agreed to adjust their date of delivery, Section 2-209(4) would enforce the alteration. Consistent with Section 2-209(5), such a modification could be retracted unless the party urging enforcement of the oral agreement reasonably and materially relied on it.<sup>48</sup> However, if the parties orally agreed to add a new term, such as an arbitration provision, the NOM clause would bar enforcement of the

---

423 So. 2d 966 (Fla. App. 1982); *Thomas Knutson Shipbuilding Corp. v. George W. Rodgers Construction Co.*, 6 U.C.C. Rep. 323 (N.Y. Sup. Ct. 1969); *Gold Kist, Inc. v. Pillow*, 582 S.W.2d 77 (Tenn. App. 1979).

45. See, e.g., *Linear Corp. v. Standard Hardware Co.*, 423 So. 2d 966 (Fla. App. 1982); *Rose v. Spa Realty Associates*, 42 N.Y.2d 338, 397 N.Y.S.2d 922, 366 N.E.2d 1279 (1979); *Gold Kist v. Pillow*, 582 S.W.2d 77 (Tenn. App. 1979); CORBIN, *supra* note 9, at 210-12; FARNSWORTH, *supra* note 13, at 476-77 (1982); Eisler, *supra* note 44, at 298-302.

Recently, the Seventh Circuit Court of Appeals embraced the reliance-based analysis. In *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), the plaintiff-buyer, Wisconsin Knife Works, entered into a contract with the defendant-seller, National Metal Crafters, for the purchase of spade bits. The contract contained a NOM clause and called for delivery of the bits by the fall of 1981. The seller failed to meet the delivery deadlines, but instead of cancelling the contract or suing for breach, the buyer accepted partial delivery of the spade bits. On January 13, 1983, however, the buyer terminated the contract and sued the seller for failing to honor the original delivery terms. A jury found that the buyer had modified the contract by accepting partial delivery.

In an opinion by Judge Posner, the Seventh Circuit held that an attempt at modification operates as a waiver "only if there is reliance." *Id.* at 1287. The court remanded the case for a finding of whether the seller had relied on the buyer's conduct. The court believed that the evidence did not preclude the possibility that the seller would have continued to produce the bits even if the buyer had terminated in the fall of 1981.

Judge Easterbrook dissented, insisting that reliance was not an essential element of waiver under Section 2-209(4): "Under Section 2-209(4) a waiver may be effective; under section 2-209(5) a waiver may be effective prospectively only if there was detrimental reliance." *Id.* at 1291. Judge Easterbrook therefore believed that the buyer's waiver, found by the jury, excused the seller's performance until January 1983, regardless of the seller's reliance.

46. See Hillman, *supra* note 5.

47. *Id.* at 366.

48. U.C.C. § 2-209(5).



provision with or without reliance on it.<sup>49</sup>

This approach limits the bite of Section 2-209(2) but preserves a role for a NOM clause. Modifications that add new or additional terms to contracts are unusual<sup>50</sup> and potentially cause greater disruption than modifications that alter existing terms. Enforcing a writing requirement in the former cases would be consistent with a NOM clause's purposes of avoiding fraud and cautioning the parties. The approach is therefore a plausible compromise for lawmakers ambivalent about the appropriate role for a NOM clause.<sup>51</sup>

Others suggest additional possible interpretations of Section 2-209.<sup>52</sup> The number and complexity of the "solutions" to the Section 2-209 quandary testify to the section's inadequacies. Whether one approves of the approaches described above or favors another, the main point is that the U.C.C. drafters did not do an exemplary job. Did the drafters of the Convention do better?

### III. Article 29(2) Of The Convention

Part III first considers the Convention's overarching principles and policies, which illuminate its approach to NOM clauses.<sup>53</sup> The Part then analyzes article 29(2), which codifies the Convention's NOM clauses solution.

#### A. Principles and Policies Underlying the Convention

The Convention's foundation is freedom of contract.<sup>54</sup> Under article 6,

49. See Hillman, *supra* note 5, at 366.

50. *Id.* at 366-67 (most of the reported cases involve adjusting the time for performance). I suggest the distinction between modifying existing terms and adding new ones because it helps resolve issues of Code interpretation. If I could wipe the slate clean, I would not favor such an approach. See Part IV. A better approach, if compromise is necessary, is to determine whether the parties were accustomed to the particular type of adjustment and whether they bargained over it. The substance of the modification is some evidence on these points but is not dispositive. See *infra* notes 99-108 and accompanying text.

51. The majority in *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1286 (7th Cir. 1986), did not accept the distinction between waiving or modifying an existing term and adding a new term, describing it as a "conceivable but unsatisfactory" solution. *Id.* at 1286. They argued that the distinction "would take care of a case such as *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902)), where seamen attempted to enforce a contract modification that raised their wages; but would not take care of the functionally identical case where seamen sought to collect the agreed-on wages without doing the agreed-on work." I would assert that both examples are "attempts at modification" that can operate as waivers. Both involve a modification of an *existing* term—the wages provision and the term enumerating the duties of the seamen, respectively—not a modification to tack on a new term such as a requirement that Alaska Packers' sell the seamen a share of the company.

52. See *supra* note 44.

53. Article 7(2) states in part that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it, are to be settled in conformity with the general principles upon which it is based. . . ."

54. See C. BIANCA & M. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 52 (1987) [hereinafter BIANCA & BONELL]; J.

"[t]he parties may exclude the application of the Convention . . . or derogate from or vary the effect of any of its provisions." The Convention does not govern consumer transactions,<sup>55</sup> nor does it apply to the validity of contracts between merchants.<sup>56</sup> It therefore should not be surprising that its provisions are not mandatory.

The Convention also aims to facilitate international transactions. Because speed and informality characterize these transactions,<sup>57</sup> the drafters generally discarded formal requirements such as the statute of frauds.<sup>58</sup> As with the U.C.C.,<sup>59</sup> the Convention also eradicates the requirement of consideration to support a modification or termination of a contract.<sup>60</sup>

A third general principle of the CISG is the promotion of uniform application.<sup>61</sup> The Convention originated from the need for a harmoni-

HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 105 (1982); *LEGAL ANALYSIS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (1980), 98th Cong., 1st Sess., Treaty Doc. No. 98-9, Sept. 21, 1983, at 3 [hereinafter cited as *LEGAL ANALYSIS*]. According to Professor Winship, article 6 of the Convention "embodies a vigorous affirmation of the principle of party autonomy." P. WINSHIP, *THE SCOPE OF THE VIENNA CONVENTION ON INTERNATIONAL SALES CONTRACTS*, PARKER SCHOOL, INTERNATIONAL SALE OF GOODS § 1.02, at 1-33 (1984) (Chapter 1).

55. See article 2(a).

56. Under article 4, the Convention "is not concerned with . . . the validity of the contract or any of its provisions." "Validity" deals with questions of mistake, duress, fraud, illegality, and unconscionability. See Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 280 (1984). Because such doctrines represent deeply held norms of justice and fairness they are mandatory in most legal systems. See BIANCA & BONELL, *supra* note 54, at 84.

57. See HONNOLD, *supra* note 54, at 155.

58. Article 11 abolishes any writing requirement. "Formal requirements have generated litigation and uncertainty and are generally regarded to be of doubtful value for international trade." *LEGAL ANALYSIS*, *supra* note 54, at 5. See also Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW 21, 26 (1984). Many of the countries adopting the Convention have discarded their statute of frauds. HONNOLD, *supra* note 54, at 152.

Article 11 does not apply, however, when a party maintains its place of business in a state which has made a declaration under article 96 that article 11 does not apply. Article 12 is to the same effect. See HONNOLD, *id.* at 155. The drafters included articles 12 and 96 to mollify the Soviet Union, which insisted that abolition of a writing requirement was inconsistent with its commercial practices. *Id.* Articles 12 and 96 are therefore exceptions to the general principle of article 11.

59. See *supra* note 35 and accompanying text.

60. Article 29(1) states that "(a) contract may be modified or terminated by the mere agreement of the parties."

61. Article 7(1) states:

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

The Convention resembles a "true code"—"a preemptive systematic, and comprehensive enactment of a whole field of law." Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 292. Under a "true Code" approach to interpretation, a court should look to the Convention itself for solutions, not to judicial construction, even when there is no express language on point. Principles and policies fill the gaps. Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103*

ous set of rules to support worldwide commerce.<sup>62</sup> Achieving the requisite uniformity may be the Convention's greatest challenge. Its text is the product of agreement among diverse states with widely differing systems. Participants in the Convention included countries with both common law and civil law traditions, capitalist and socialist philosophies, and immense and paltry wealth.<sup>63</sup> As Professor Rosett has suggested, the monumental task of legal harmonization among such diverse political systems required numerous compromises.<sup>64</sup> Unfortunately, such compromises seriously undermine the precision and certainty essential to a successful legal code.<sup>65</sup>

Finally, the CISG includes a reference to good faith.<sup>66</sup> Although this standard has analogues in many domestic legal systems,<sup>67</sup> including the U.C.C.,<sup>68</sup> the CISG's good faith provision created much controversy.<sup>69</sup> Many delegates felt that "good faith" was too vague.<sup>70</sup> A provision on good faith was ultimately included, but only as a supplement to the interpretation of the Convention, rather than as an affirmative obligation of the parties to a contract.<sup>71</sup>

## B. Article 29(2)'s Treatment of NOM Clauses

The Convention deals with NOM clauses in article 29(2). The article provides:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that

---

and "Code" Methodology, 18 B.C. IND. & COMM. L. REV. 655, 657 (1977). See also Rosett, *supra* note 56, at 297-98. Indeed, article 7(2) specifically directs courts to internal principles when a matter "is not expressly settled."

62. Rosett, *supra* note 56, at 266-67.

63. *Id.* at 268, 270.

64. See Rosett, *supra* note 56. Professor Rosett asserts that, in an effort to secure agreement among the delegates, the drafters often masked unresolved differences through vague and general language. Various provisions of the Convention "do not reflect two parties having yielded part of their positions to each other for the sake of agreement, but rather two sides agreeing to give the appearance of agreement by a verbal formula which does not provide meaningful guidance in concrete situations." *Id.* at 282.

65. See generally Hillman, *supra* note 61, at 710 n.310.

66. Article 7(1) provides that "[i]n the interpretation of this convention, regard is to be had to . . . the observance of good faith in international trade."

67. See BIANCA & BONELL, *supra* note 54, at 85-86; HONNOLD, *supra* note 54, at 124, and sources cited therein.

68. U.C.C. § 1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

69. See BIANCA & BONELL, *supra* note 54, at 85-86; HONNOLD, *supra* note 54, at 123; Rosett, *supra*, note 56, at 289-90.

70. See BIANCA & BONELL, *supra* note 54, at 85-86; HONNOLD, *supra* note 54, at 123.

71. See HONNOLD, *supra* note 54, at 124; but see BIANCA & BONELL, *supra* note 54, at 85. Professor Bonell argues that the obligation of good faith may apply directly to the parties.

the other party has relied on that conduct.<sup>72</sup>

As with Section 2-209 of the U.C.C., the Convention first recognizes NOM clauses and then diminishes them,<sup>73</sup> but article 29(2) at least avoids some of the curious language of Section 2-209. Instead of the confusing reference to an "attempt at modification" that may preclude enforcement of a NOM clause, we have "conduct" of a party that may do the same. Instead of the U.C.C.'s ambiguity regarding when an attempt at modification "operates as a waiver," concerning the meaning and legal effect of a waiver once found, and about the opportunity for retraction of the waiver, article 29(2) provides simply that reliance on a party's conduct may preclude that party from asserting a NOM clause.

In terms of brevity and simplicity, article 29(2)'s treatment of NOM clauses is a colossal improvement over the Code's. However, in view of the inconclusive debate concerning NOM clauses, a simple, clear compromise may be impossible.

Article 29(2) raises serious questions as to its scope and application.<sup>74</sup> For example, what are the proper judicial responses to the "conduct" and "reliance" tests of the article? Presumably, the Convention's

72. An earlier version of article 29(2) more closely resembled Section 2-209 of the U.C.C. Article 3A provided:

(1) An agreement by the parties made in good faith to modify or rescind the contract is effective. However, a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

(2) Action by one party on which the other party reasonably relies to his detriment may constitute a waiver of a provision in a contract which requires any modification or rescission to be in writing. A party who has waived a provision relating to any unperformed portion of the contract may retract the waiver. However, a waiver cannot be retracted if the retraction would result in unreasonable inconvenience or unreasonable expense to the other party because of his reliance on the waiver.

*Report of the Working Group on the International Sale of Goods on the Work of Its Eighth Session*, A/CN.9/128, para. 36. Because some believed that this version was too complex and unclear, a "working group" consisting of representatives from Austria, Czechoslovakia, and the United Kingdom of Great Britain and Northern Ireland substantially composed the final text. *Id.* at 77, para. 43-45. Despite the changes, the final version also "resembles" U.C.C. Section 2-209. See HONNOLD, *supra* note 54, at 231.

73. The present structure of article 29 represents a compromise between the pro and anti-NOM clause factions in the working group. Those favoring NOM clauses argued that parties wishing to preserve an "adequate paper record" of their dealings should be able to do so. Those opposed contended that barring enforcement of oral modifications on the basis of a NOM clause would be unfair. The present structure was retained on the grounds of "balance." See *Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session*, A/CN.9/142, reprinted in IX Y.B. UNCITRAL 72.

The termination language in article 29(2) replaces the rescission terminology in Section 2-209, and, presumably, serves the same purpose. See *supra* note 33.

74. Professor Date-Bah contends that article 29(2) provides a "flexible framework within which to reach fair results when one party's behavior is such that it would be unfair to allow him to insist on the requirement of a writing." BIANCA & BONELL, *supra* note 54, at 243. Not one but two references to fairness in this explanation suggests how open-ended this article is. Professor Rosett argues that the goal of the

open-ended reference to "conduct" is at least as broad as the "attempt at modification" language of the U.C.C.<sup>75</sup> Might the test even be broader? Does article 29(2) mean that any behavior that lulls a party into believing that a written adjustment is unnecessary overrides a NOM clause?

Similarly, although Section 2-209(5)'s "material change of position" test offers at least some guidance as to when a court may bar a retraction of a waiver and thereby enforce a NOM clause,<sup>76</sup> article 29(2) is devoid of such tests. This raises a number of questions. Must reliance be foreseeable?<sup>77</sup> If so, measured by what standard? Must reliance be reasonable?<sup>78</sup> If so, is reliance on an oral agreement modifying a contract ever reasonable when the contract contains a NOM clause?<sup>79</sup>

The Convention's general principles do not help very much in resolving these questions. In fact, they simply require the interpreter to revisit the issues discussed, but not resolved, in this paper.<sup>80</sup> What approach to NOM clauses best advances freedom of contract? What approach facilitates commerce? What approach promotes uniformity?

Courts seeking a model to resolve NOM clause issues could look to analogous law developed in various states. For example, the law of promissory estoppel in the United States suggests a test of reliance. A promisor is bound to a promise when the promisee's reliance is substantial and reasonably foreseeable.<sup>81</sup> Even reliance on a revocable offer

drafters was to avoid offending any of the participants. The result was often a high level of abstraction. Rosett, *supra* note 56, at 286.

75. Article 29(2)'s apparent breadth is, of course, hardly surprising in light of the Convention's low regard for formal writing requirements. See *supra* notes 57-60 and accompanying text.

76. The Section invokes the tests of "materiality" and "injustice." See *supra* notes 42-43 and accompanying text.

77. Other articles, considering other problems, expressly employ the foreseeability test. See, e.g., art. 25.

78. Other articles, dealing with other problems, expressly so require. See, e.g., art. 15(3).

79. See *supra* note 27 and accompanying text. Professor Honnold sets forth an application of article 29(2):

A written contract called for Seller to manufacture 10,000 units of a product according to specifications that were supplied by Buyer and set forth in the contract. The contract provided: 'This contract may only be modified by a writing signed by the parties.' Before Seller started production, the parties by telephone agreed on a change in the specifications. Seller produces 2,000 units in accordance with the new specifications; Buyer refused to accept these units on the ground that they did not conform to the specification in the written contract.

HONNOLD, *supra* note 54, at 231. He suggests that Buyer could insist on the original specifications only for production after the 2,000 units. But was Seller's reliance on the telephone call reasonable? Is reasonable reliance required? See *infra* notes 104-05 and accompanying text.

80. See *supra* Parts I and II.

81. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); James King & Son, Inc. v. De Santis Construction, No. 2 Corp., 92 Misc. 2d 1063, 413 N.Y.S.2d 78 (Sup. Ct. 1977); Blackwell v. Int. Union, 9 Ohio App. 3d 179, 458 N.E.2d 1272 (1983).

may be reasonably foreseeable and therefore bar revocation of the offer.<sup>82</sup> Under this approach, when reliance on an oral modification is substantial and reasonably foreseeable, article 29(2) would bar enforcement of a NOM clause.<sup>83</sup> On the other hand, article 29(2) may demand a narrower interpretation of reliance. Otherwise a NOM clause, although recognized by article 29(2), would have little function.<sup>84</sup> In addition, following a particular state's approach to reliance runs the danger of undermining uniformity of interpretation.<sup>85</sup>

In the end, a proper interpretation of "conduct" and "reliance" may depend on one's view of the value of NOM clauses. Broad interpretations swallow up NOM clauses, while restrictive ones preserve them.

Another imbroglio involving the Convention's treatment of NOM clauses concerns the relationship between article 6 and article 29(2). Article 6 entitles the parties to substitute their contract's own law for "any" provision of the Convention.<sup>86</sup> Suppose the parties include a NOM clause that states that "no modification of this contract shall be binding unless in writing." Have these parties, in the language of article 6, "derogat[ed] from or var[ied] the effect" of a "provision" of the Convention, namely article 29(2)'s reliance exception to the enforceability of a NOM clause?<sup>87</sup>

The express language of the NOM clause certainly suggests that the parties intended to bar enforcement of oral modifications completely. On the other hand, a court might conclude that the NOM clause was unclear because it did not specifically refer to article 29(2) or to the effect of reliance on an oral modification. However, article 6 does not

82. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981). See also R. HILLMAN, J. McDONNELL & S. NICKLES, *COMMON LAW AND EQUITY UNDER THE U.C.C.* ¶ 2.03[3][b] (1985).

83. This interpretation is consistent with the promotion of good faith in international trade. When reliance on an oral modification is reasonably foreseeable, a party's rigorous insistence on enforcement of a NOM clause would be in bad faith.

84. See *supra* notes 45-46 and accompanying text. Under whatever views of "conduct" and "reliance" courts ultimately coalesce, a NOM proponent will still be entitled to reinstate its rights prospectively by clear notice to the other party. In such a situation, there would no longer be any conduct on which to rely and, hence, no longer any reasonable reliance. See BIANCA & BONELL, *supra* note 54, at 243; HONNOLD, *supra* note 54, at 231.

85. Unlike the Code, the Convention is not a "common law" code anticipating case construction. According to Professor Rosett "most of the participants in the Convention have legal systems that do not accord court decisions the dispositive authority which they possess in the common-law system." Rosett, *supra* note 56, at 272. Because most participating states do not have well-developed systems for reporting decisions, it also may be quite difficult for a judge to learn how other states apply the Convention. *Id.* at 299.

86. Article 6 is set forth and discussed at text accompanying notes 54-56.

87. Professor Honnold states that "the Convention's gamut of provisions on the obligations of seller and buyer and the remedies for breach (Part III) [of which article 29(2) is a part] may be reshaped by the agreement." HONNOLD, *supra* note 54, at 105. He also states that article 6 authorizes the parties to "broaden the scope" of article 29(2). *Id.* at 230.

require an express exclusion or derogation.<sup>88</sup> Instead, the Convention directs courts to determine the parties' implicit intentions in light of the circumstances.<sup>89</sup> Because it taxes the imagination to envision parties' bargaining to include a clause barring oral modification only in the absence of reliance, presumably the court would decide that the parties intended to bar all oral modifications.

The Convention does not expressly preclude parties from "derogat[ing] from" article 29(2)'s reliance exception. In fact, the Convention bars enforcement of the reliance exception when a state makes a declaration under articles 12 and 96 that all contracts and modifications must be in writing.<sup>90</sup> One could assert that the Convention, in light of its emphasis on freedom of contract, confers the same right on the parties. Although the Convention generally quashes formal requirements, the goal was to eliminate such requirements supplied by law, not those supplied by the parties themselves.<sup>91</sup>

Despite the Convention's silence, however, the better interpretation probably is that the parties cannot derogate from the reliance exception of article 29(2). Article 29(2) is itself a limitation on the parties' article 6 freedom of contract; otherwise, article 6 completely subverts article 29(2)'s reliance exception. Presumably the drafters intended a role for the latter provision.

The appropriate resolution of the issues raised under article 29(2) is not self-evident. As with the U.C.C., this is not surprising in view of the general ambivalence about NOM clauses, the absence of empirical evidence on the effects of the enforcement of NOM clauses, and the lack of any particular theoretical insight on the issues raised by these clauses.<sup>92</sup> Can drafters avoid the questions the U.C.C. and the CISG present with regard to NOM clauses? What should we tell the next

---

88. See *BIANCA & BONELL*, *supra* note 54, at 55; *HONNOLD*, *supra* note 54, at 106.

89. Article 8 contains the convention rules governing the interpretation of the intent of the parties. It provides:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Professor Rosett criticizes article 8 for including both subjective and objective tests and not clearly guiding their usage. Rosett, *supra* note 56, at 288.

90. See *supra* note 58.

91. Article 11 of the Convention does not preclude parties from imposing formal requirements such as a NOM clause. *HONNOLD*, *supra* note 54, at 153. Such formal requirements therefore should be distinguished from formal requirements imposed by operation of law.

92. See generally Rosett, *supra* note 56, at 285.

group of drafters facing the NOM clause controversy? These questions are the subject of Part IV.

#### IV. NOM Clauses In Sales Law

The NOM clause issues raised by the CISG and the U.C.C. derive from a fundamental ambivalence about the wisdom of enforcing such provisions. Under the CISG, the appropriate approach to "conduct" and "reliance," and the relationship between articles 6 and 29(2), depend on the extent to which we want to enforce NOM clauses. A suitable interpretation of U.C.C. Section 2-209 involves similar considerations.

Tackling the difficult philosophical, conceptual, and empirical questions presented<sup>93</sup> may help resolve the NOM clause question, but I am not optimistic. The command of freedom of contract in this context remains elusive, as does the meaning of reasonable reliance. Empirical evidence about the parties' actual practices will be costly and likely indeterminate.<sup>94</sup>

Perhaps future drafters should abandon compromise, which inevitably generates confusion. Instead, they should swallow hard and then decide simply to enforce NOM clauses or to abolish them. Either approach would be certain, simple, and would thus promote uniform interpretation. Either approach might therefore be superior to the U.C.C. or the Convention.<sup>95</sup>

Given a choice between enforcing NOM clauses and abolishing them, I would favor the latter, at least if the debate took place in the United States. My reasons are practical ones. All other things being equal (or equally unknown), perhaps the law should respect the latest bargain or position of the parties. This approach accords with the common law ban on NOM clauses,<sup>96</sup> which hardly wreaked havoc on commercial transactions in this country. Given the doubt concerning NOM clauses, we should preserve the *status quo ante*. In addition, abolishing NOM clauses is consistent with the momentum of contract law in the United States to protect the reliance interest.<sup>97</sup> Finally, enforcing the parties' most recent agreement or position has intuitive, if not reasoned, appeal.<sup>98</sup>

---

93. See *supra* notes 17-30 and accompanying text.

94. See *supra* Part I.

95. See *supra* Parts II and III.

96. See *supra* note 13 and accompanying text.

97. See, e.g., Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936); Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Some criticize judicial application of promissory estoppel. See, e.g., Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984). Others, however, reject the view that reliance is the core of promissory estoppel cases. See Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985).

98. One could construct an argument based on good faith in support of this position. It would be dishonest for a party to use a NOM clause as a shield after that



How should those bent upon compromise approach NOM clauses? Although compromise will inevitably generate some confusion and uncertainty, the confusion would be significantly reduced by an approach to NOM clauses that focuses on and compares the nature of the parties' assent to the NOM clause and to the subsequent oral modification.

Suppose, for example, that the parties typically bargained very informally, were generally unconcerned about the contents of their written contract, and were either unaware of the inclusion of a NOM clause or ignorant of its effect.<sup>99</sup> In short, the NOM clause was not a "dickered" term.<sup>100</sup> In addition, suppose that the parties valued their flexibility, often modified their agreements orally, carefully ironed out their oral modification and were comfortable with their subject matter.<sup>101</sup> Obviously, these parties would be surprised to learn that their modification agreement was unenforceable. Under these circumstances, the principle of freedom of contract strongly suggests enforcing an oral modification despite the NOM clause.<sup>102</sup>

Conversely, assume that the parties carefully bargained over their initial contract, including the NOM clause. Suppose further that it was highly unusual for the parties to adjust their agreement orally. If the parties nevertheless precipitously modified their contract orally, a court probably should enforce the NOM clause.<sup>103</sup> The parties sought protection in their NOM clause from just such situations.

---

party has agreed to an oral modification. Conversely, an equally compelling argument could be made against the party who seeks to enforce the oral modification notwithstanding a NOM clause, thus circumventing the "law" of the contract.

99. Or suppose the NOM clause was contained in one party's form in the context of what is referred to in the United States as a "battle of the forms." See WHITE & SUMMERS, *supra* note 24, at 24-39. In such a transaction, the parties exchange their purchase order and acknowledgment forms through the mail and begin to perform the contract, often ignorant of the precise terms on the forms, which often conflict.

100. See K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-371 (1960).

101. Under both the U.C.C. and the CISG, in fact, the parties may be bound to any practice of oral adjustment. See U.C.C. § 1-205; Convention art. 9.

102. See *supra* note 10.

103. This general approach was suggested, but ultimately rejected, by the drafters of the CISG. In the deliberations on article 29(2)'s recognition of a NOM clause, the delegate from Italy had the "battle of the forms," see *supra* note 99, or a similar problem in mind when he suggested a basically assent-based approach to NOM clauses. He argued that "when the requirement of written . . . modification had not been specifically accepted by the parties to a contract, but had merely been included in the general conditions drawn up unilaterally by one of them," an oral modification should be enforceable. Com. I (art. 27), SR. 13 para. 56 (1980). The delegate from Bulgaria opposed this suggestion on the theory that "(t)he parties to commercial contracts usually enjoyed equal bargaining power and did not need the defence offered by the amendment." The latter reasoning prevailed. *Id.* at paras. 57-60.

The Uniform Commercial Code hints at an assent-based approach to NOM clauses in Section 2-209(2)'s requirement that such clauses be separately signed. However, this requirement applies only when a merchant supplies the form to a consumer. Hillman, *supra* note 5, at 357-58.

Focusing on assent helps resolve fairness questions raised by the enforcement of a NOM clause after a party has relied on an oral modification.<sup>104</sup> In the context of an informal, flexible relation, reliance on an oral adjustment may well be reasonable even when the written contract contains a boiler-plate NOM clause. Ignoring such reliance would be unfair. On the other hand, reliance on an ill-conceived, hurried, oral modification of a meticulously bargained contract containing a prominent NOM clause may be unreasonable. Enforcement of a NOM clause in such circumstances would not be unfair.<sup>105</sup>

An assent-based analysis is also consistent with utilitarian considerations.<sup>106</sup> Even if the parties had adequate information to assess the costs and benefits of a NOM clause,<sup>107</sup> the inclusion of such a clause is consistent with the parties' best interests only when they knew of its inclusion and understood its legal effect. In addition, a carefully bargained oral modification cautions the parties and, in most instances, should provide ample evidence of its existence.

Still, I harbor no illusions that an assent-based inquiry would offer certainty and simplicity. The test requires courts to sift through potentially conflicting evidence concerning the parties' bargaining and other conduct at two different stages of their transaction. Nevertheless, for those who insist on a compromise position on NOM clauses, an assent-based test would solve several important problems while appropriately focusing the inquiry on the issues that underlie the NOM clause controversy.<sup>108</sup>

How should the drafters, seeking a compromise position on NOM clauses, resolve a "hard" case, in which the focus on assent does not compel a particular result? Suppose, for example, that the parties carefully bargained over their NOM clause *and* their oral modification.<sup>109</sup>

104. See *supra* note 27 and accompanying text.

105. But I would not require proof of actual reliance in a new framework. Although reliance will almost always exist, it may be hard to prove and rebut. For example, reliance may consist of forgoing some other opportunity. See Fuller & Perdue, *supra* note 97.

106. See *supra* notes 8-9, 11-12, 19-24 and accompanying text.

107. See *supra* notes 28-29 and accompanying text.

108. A new NOM clause rule would state:

Enforcement of a clause precluding oral modification or termination depends on the parties' intentions as determined by the overall circumstances. Relevant circumstances include the purpose of the parties' written contract, any custom concerning the use of NOM clauses, the parties' course of dealing on NOM clauses, whether the parties specifically considered the NOM clause, whether they understood its effect, any custom involving the procedure for modifying written contracts, the parties' course of dealing on modification, the purpose of the modification, and the nature of the bargaining of the modification.

109. For example, in a large corporation, the persons with authority to modify a contract might not be those who negotiated the contract. An engineer may want to change the specifications of an order or a company's sales representative or purchasing agent may want to alter the delivery date or the size of an order. These persons may act in good faith in ignorance of the fact that others bargained over a NOM clause.

For reasons already mentioned—the conflicting or unclear messages of principles of autonomy, fairness, and utility,<sup>110</sup> and the practical guidance of history, analogous law, and even intuition<sup>111</sup>—I favor the parties' final oral bargain in such a hard case.

### Conclusion

The Convention's treatment of NOM clauses is superior to the U.C.C.'s. Nevertheless, I predict article 29(2) will also generate some confusion and controversy. The next group of drafters considering NOM clauses should simply abolish them. For those insisting on a compromise position, a contextual analysis comparing the initial bargain with the subsequent oral modification may well prove a fruitful alternative methodology.

---

110. *See supra* Part I.

111. *See supra* notes 96-98 and accompanying text.